Employment Standards TRIBUNAL

An appeal

- by -

D. Kendall & Son Contracting Ltd.
("Kendall & Son")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2009A/111

DATE OF DECISION: October 22, 2009

DECISION

SUBMISSIONS

Dean Davison	Counsel for D. Kendall & Son Contracting Ltd.
Rick Lozon	on his own behalf
Karin Doucette	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the *"Act"*) by D. Kendall & Son Contracting Ltd. ("Kendall & Son") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on July 17, 2009.

2. The Determination was made by the Director on a complaint filed by Rick Lozon ("Lozon") who alleged Kendall & Son had contravened the *Act* by failing to pay wages, including regular and overtime wages, annual vacation and statutory holiday pay and length of service compensation. The Determination found that Kendall & Son had contravened Part 3, section 21, Part 4, sections 32 and 40, Part 5, section 46, and Part 8, section 63 of the *Act* and ordered Kendall & Son to pay Lozon an amount of $8,141.63, an amount which included wages and interest.

3. The Director also imposed administrative penalties on Kendall & Son under Section 29(1) of the E*mployment Standards Regulation* (the *"Regulation"*) in the amount of $2,500.00.

4. The total amount of the Determination is $10,641.63.

5. Kendall & Son has appealed the Determination, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination. Kendall & Son has also indicated in the appeal that evidence has become available that was not available when the Determination was being made.

6. None of the parties to this appeal has asked that the Tribunal should conduct a hearing on this appeal and while we have a discretion whether to hold a hearing on an appeal – see Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal's *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575 – I have reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and have decided a hearing is not necessary in order to decide this appeal.

ISSUE

7. The issue in this appeal is whether Kendall & Son has shown the Director erred in law or failed to observe principles of natural justice in making the Determination.

THE FACTS

8. The background information provided in the Determination states that Kendall & Son is in the business of hauling rock and building logging and forest access roads and bridges. For the purposes of the complaint Lozon's period of employment with Kendall & Son was from March 7, 2008 to July 6, 2008. He was employed as an equipment operator/truck driver/labourer.

9. Lozon claimed he had worked hours, including overtime hours, for which he had not been paid, had been paid less that the hourly wage rate agreed between he and Dan Kendall, the principal of Kendall & Son, had not been paid annual or statutory holiday pay and had been terminated without cause, without notice and without compensation in lieu of notice.

10. In response to the complaint, Kendall & Son disputed Lozon's hours of work and his claimed wage rate, contended Lozon was a manager under the *Act* and not entitled to overtime and alleged Lozon was not entitled to length of service compensation because there was just cause for his termination.

11. The Director conducted a complaint hearing. Prior to the complaint hearing, Lozon and Kendall & Son submitted extensive written statements on their respective positions. Each party provided oral evidence at the complaint hearing and were cross-examined on that evidence and questioned by the delegate conducting the complaint hearing. Other persons provided evidence on behalf of one or other of the parties and were similarly cross examined and questioned on that evidence. The Determination contains an outline of the evidence provided. It appears the matter of deductions from wages that had been made for camp fees was raised during the complaint hearing.

12. The Director considered the evidence provided and made the following findings on that evidence in the Determination:

- Lozon's wage rate for the period was $23.50 an hour;
- Lozon was not a "manager" as defined in the *Act*;
- Kendall & Son did not establish there was just cause to summarily dismiss Lozon;
- Lozon was on a "temporary layoff", commencing July 6, 2008 and was deemed terminated on October 5, 2008 when the period of "temporary layoff" ended;
- the amount of Lozon's entitlement to compensation for length of service was calculated on his period of employment from March 7, 2008 to July 6, 2008;
- the hours recorded by Lozon on his time sheets, as adjusted by Lozon at the complaint hearing and by findings made by the Director relating to meal breaks and travel time, were Lozon's hours of work;
- Lozon worked overtime hours;
- Lozon was entitled to statutory holiday pay for Victoria Day and Canada Day; and
- Kendall & Son's deduction for camp costs was not authorized in writing by Lozon and was otherwise not permitted under the *Act*.

13. The Director found Kendall & Son had contravened several provisions of the *Act* and imposed administrative penalties.

ARGUMENT

14. This appeal alleges the Director erred in law and failed to observe principles of natural justice in making the Determination. The exact nature of the error of law is not identified and the appeal submission is framed around the general proposition that the Director failed to conduct a proper investigation and ignored or misunderstood the evidence. The appeal submission seems to suggest the error of law arises from the failure to observe principles of natural justice.

15. Kendall & Son says they were not given a full opportunity to respond and that no effort was made by the Director to substantiate Lozon's claims that went beyond talking to his common-law wife. Kendall & Son says, in contrast, they submitted evidence that clearly showed Lozon was attempting to defraud them and was exaggerating his hours of work.

16. Kendall & Son says the Director breached principles of natural justice by believing Lozon when he was obviously being dishonest and ignoring evidence of hours of work that could not possibly have been accurate. Several pages of the appeal submission are devoted to pointing out those areas where Kendall & Son says the hours of work were exaggerated under the headings: "Impossible Kilometre Calculations from May 29, 2008 to June 7, 2008", "300 Meters Claimed v. 150 Meters Completed", "Arrived at 10:30 am but Charged Starting at 7:30 am", and "Failing to Submit Hours".

17. The appeal also submits the Director erred on the travel time, termination, manager and meal break issues.

18. In the appeal, Kendall & Son has sought to introduce evidence that was not before the Director during the complaint process. This evidence comprises a Safety Orientation Checklist dated May 30, 2008, a communication with the Tribunal dated July 2, 2009, documents from Canada Revenue Agency to Kendall & Son created in February 2009 and four statements provided to Kendall & Son by Fast Fuel Services Ltd. for the period May 6, 2008 to July 24, 2008.

19. In response to the appeal, the Director says Kendall & Son is attempting to use the appeal process to alter findings of fact and reargue its case. The Director says no error of law is shown and the conclusions of fact which Kendall & Son is seeking to have altered were the product of an assessment and a reasoned analysis of the evidence presented in the complaint process. The Director says Kendall & Son has not shown there was any breach of principles of natural justice; that Kendall & Son was given sufficient opportunity to know and understand the complainant's allegations and to respond to those allegations.

20. The Director says some of the evidence provided with the appeal is not "new" and should not be accepted with the appeal and that while other evidence provided is, technically, "new evidence", it does not satisfy the test established by the Tribunal for the inclusion and consideration of such evidence in an appeal.

21. Lozon has also filed a response to the appeal. In that response, he expresses his disagreement with many of the points made by Kendall & Son. He also seeks to submit new evidence, relating to an alleged fault in the odometer of one of Kendall & Son's trucks.

22. Kendall & Son has made a final reply which responds to Lozon's submissions about the odometer, returns again to the matter of "exaggerated hours" and provides two statements concerning events which are described as having occurred on, and about, September 4, 2009.

ANALYSIS

23. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
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> *(a) the director erred in law:*
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> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

24. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

25. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

26. I will first address the "new evidence" submitted by both Kendall & Son and Lozon in this appeal. The Tribunal is given discretion to accept or refuse new or additional evidence. The Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New or additional evidence which does not satisfy any of these conditions will rarely be accepted.

27. I am not inclined to accept any of this "new evidence". Notwithstanding the view of the Director concerning some of this evidence, the only "new" evidence that has been provided by either party are the documents which came in existence after the Determination was made – the two statements describing events on, or about September 4, 2009. Those documents, however, are clearly not relevant to or probative of any aspect of the appeal. All of the other "evidence" submitted was available at the time the Determination was made and as such does not meet the first consideration for admitting evidence on an appeal. Additionally, I am not satisfied from the submissions of either party that this evidence is probative. The Director notes that the hours claimed by Lozon were adjusted in the final calculation of hours worked made in the Determination, including the hours of work claimed by Lozon for May 24, 2008 and June 24, 2008. If the additional evidence represents an attempt to demonstrate Lozon was attempting to defraud the employer and was exaggerating his hours, that evidence falls well short of attaining that objective.

28. As a result of this decision on the additional evidence presented, the appeal will be decided on the Determination, the material found in the section 112 Record and on the submissions of the parties.

29. The appeal submission alleges a failure by the Director to observe principles of natural justice in three respects: not giving Kendall & Son a full opportunity to respond; in failing to conduct a proper investigation; and by ignoring or misunderstanding relevant evidence.

Opportunity to Respond

30. In respect of the allegation that the Director did not give Kendall & Son a full opportunity to respond, the Tribunal, in *Imperial Limousine Service Ltd.*, BC EST # D014/05, has briefly summarized the natural justice concerns that typically operate in this context:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST # D050/96.

31. Kendall & Son has not provided any evidence to support the allegation that the Director did not provide them with a full opportunity to respond. In fact, from an examination of the Determination and the material in the section 112 Record it is difficult to fathom where this allegation comes from. The Determination and section 112 Record clearly demonstrate there was no denial of procedural rights in this regard and that Kendall & Son had sufficient notice of the basis of the claims being made by Lozon and ample opportunity, which it used, to provide a response to those claims.

Failure to Conduct a Proper Investigation

32. Similarly, Kendall & Son alleges the Director failed to conduct a proper investigation, but has not provided an evidentiary basis for this allegation or even identified how this allegation arises. It appears to arise from a disagreement by Kendall & Son with several conclusions of fact reached by the Director that run against the facts asserted by Kendall & Son in the complaint process. Principles of natural justice, however, do not require the decision maker to accept all of the facts asserted by each party – that would be absurd and make the process unworkable – nor does it prohibit the decision maker from accepting the evidence presented by one party over the evidence presented by the other so long as reasons are provided for the conclusion being made and those reasons are based on relevant considerations, which I find they were in this case. The Director made findings of fact based on an assessment of the evidence presented by the parties involved. Reasons for the findings of fact made were provided in the Determination. Those reasons are based on relevant considerations and are well supported by an analysis of the evidence given, and on some matters not given, and the submissions made to the Director during the complaint hearing. The result of making those decisions does not amount to failure to observe principles of natural justice because one of the parties is dissatisfied with the resulting findings.

33. In any event, as a general response to this allegation, it is difficult to understand how a "failure to conduct a proper investigation" can be a breach of natural justice. Following amendments to the *Act* in May 2002, the Director is not statutorily required to "investigate" a complaint made under the *Act*. Section 76 requires the Director to "accept and review" a complaint made under section 74. The *Act* now appears to provide the Director with a level of discretion about whether to conduct an investigation and does not direct how an investigation is to be conducted. It may be that a breach of natural justice can arise from a total failure to conduct any investigation. Otherwise, it seems to me that a breach of principles of natural justice can only

arise within the investigation from a failure to ensure procedural fairness to one or all of the parties and as stated earlier, no evidence has been provided showing the process, however that process might be described, was procedurally unfair to Kendall & Son.

Ignoring and Misunderstanding Evidence

34. Kendall & Son says the Director ignored or misunderstood evidence. As a general proposition, I accept the submission of Kendall & Son that a failure by the Director to consider relevant evidence is a breach of natural justice and an error in law which can result in a setting aside of the Determination. In that respect, I adopt the following analysis from *Jennifer Oster*, BC EST # D120/08, describing the relationship between errors of fact, error of law and failure to observe principles of natural justice at paragraphs 42-45:

> The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):
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> 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
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> 2. a misapplication of an applicable principle of general law;
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> 3. acting without any evidence;
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> 4. acting on a view of the facts which could not reasonably be entertained; and
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> 5. adopting a method of assessment which is wrong in principle.
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> A failure to observe principles of natural justice is a species of error of law: see *J.C. Creations operating as Heavenly Bodies Sport*, BC EST # RD317/03. An appellant alleging a failure to observe principles of natural justice, as Oster does here, must provide some objectively cogent evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
>
> The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03). In the *Britco Structures Ltd.* decision, the Tribunal concluded that findings of fact were reviewable as errors of law under the third and fourth categories of the *Gemex* test: that is, if they are based on no evidence or on a view of the facts which could not reasonably be entertained. The Tribunal also noted that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, they are inconsistent with and contradictory to the evidence or they are without any rational foundation.
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> Further, in the *Britco Structures Ltd.* decision the Tribunal also considered the possibility that a failure by the Director to consider relevant evidence could constitute a breach of natural justice, which would be reviewable by the Tribunal under s. 112(1) (b). See also *Flora Faqiri*, BC EST # D107/05.

35. I do not, however, accept the Director has made an error in law and failed to observe principles of natural justice by ignoring or misunderstanding relevant evidence in this case. I return to the *Jennifer Oster* decision, at paragraph 46:

The Tribunal has considered the limitations of intervening in a Determination on the basis the Director "failed to consider relevant evidence", as reflected in the following excerpt from the analysis in *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05, at paras. 40-43:

> . . . there are good reasons for the Tribunal to exercise caution in intervening with a decision of the Director on the basis that a delegate failed to consider relevant evidence. First, as pointed out by D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at paragraph 12:3700,
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> > . . . any attempt to determine whether an administrative decision-maker has considered "all of the evidence" as a matter of procedural fairness, can come very close to the reassessment of the actual findings of fact, which would be inconsistent with the usual deferential approach to review of findings of fact.
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> Second, the Tribunal should not lightly find that a delegate has failed to consider relevant evidence. Although the Director and his delegates have a duty, both under the Act and at common law, to provide reasons for their determinations, "[i]t is trite law that an administrative tribunal does not have to recite all of the evidence before it in its reasons for decision": *International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster*, [2002] 212 F.T.R. 111, 2001 FCT 1115, at para. 46; see also *Manuel D. Gutierrez*, BC EST # D108/05, at para. 56. Thus, that a delegate does not mention particular relevant evidence in his or her reasons does not, in and of itself, demonstrate a failure to consider that evidence in making the determination. That said, the more relevant and probative the evidence is, the greater the expectation that this evidence will be considered expressly in the delegate's reasons.
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> Third, even if an appellant establishes that a delegate failed to consider relevant evidence, it does not automatically follow that the delegate failed to observe the principles of natural justice in making the determination. In *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 at 491-92, Lamer C.J. held that the rejection of relevant evidence is not automatically a breach of natural justice; rather, whether it constitutes a breach of natural justice depends on the impact of the rejection of the evidence on the fairness of the proceeding:
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> > For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.
>
> Relevant factors include the importance to the case of the issue upon which the evidence was sought to be introduced, and the other evidence that was available on that issue. Although *Université du Québec à Trois-Rivières* involved a refusal to permit a party to adduce relevant evidence, this reasoning applies with equal force to the question of whether a failure to consider relevant evidence denied a party a fair hearing. Thus, whether a failure to consider relevant evidence amounts to a breach of the principles of natural justice will depend on the particular circumstances of each case.

36. In this case, Kendall & Son has not persuaded me the Director ignored or misunderstood the evidence they provided during the complaint process. In all of the areas addressed by Kendall & Son in the appeal submissions, there was other evidence available on the issue besides what they submitted in the complaint hearing. The Determination quite clearly indicates the evidence submitted by Kendall & Son was considered but, in some areas, was rejected in favour of the evidence provided by Lozon and, in other areas, was tempered by an assessment and analysis of other available evidence and an application of the provisions and requirements of the *Act*.

37. As a result of my conclusions on the grounds and arguments made by Kendall & Son in this appeal, I find this appeal is an effort by Kendall & Son to have the Tribunal review and alter findings of fact made in the Determination without persuading me there is authority for me to do so under any of the grounds set out in section 112(1). Accordingly, Kendall & Son has not met its burden and the appeal is dismissed.

ORDER

38. Pursuant to Section 115, I order the Determination dated July 17, 2009, be confirmed in the amount of $10,641.63, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal